

APR 12 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOSE ALBERTO TORRES,

Defendant - Appellant.

No. 04-30528

D.C. No. CR-04-00126-EJL

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Submitted April 5, 2006^{**}

Before: HAWKINS, McKEOWN, and PAEZ, Circuit Judges.

Jose Alberto Torres appeals from the 70-month sentence imposed after his guilty-plea conviction to unlawful re-entry following deportation, in violation of 8 U.S.C. § 1326. We have jurisdiction pursuant to 28 U.S.C. § 1291.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

As to Torres' contention that the case be remanded for re-sentencing, because Torres was sentenced under the then-mandatory Sentencing Guidelines, and we cannot reliably determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory, we remand to the district court to answer that question, and to proceed pursuant to *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc). *See United States v. Moreno-Hernandez*, 419 F.3d 906, 916 (9th Cir. 2005) (extending *Ameline*'s limited remand procedure to cases involving non-constitutional error under *United States v. Booker*, 543 U.S. 220 (2005)).

As to Torres' remaining contention that the district court erred in exceeding the statutory maximum two-year sentence under 8 U.S.C. § 1326(a), we dismiss in light of the valid appeal waiver. *See United States v. Nguyen*, 235 F.3d 1179, 1182 (9th Cir. 2000) (stating that an appeal waiver is valid when it is entered into knowingly and voluntarily); *see also United States v. Weiland*, 420 F.3d 1062, 1080 n.16 (9th Cir. 2005) (noting that the court continues to be bound by the Supreme Court's holding in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)).

REMANDED in part, and DISMISSED in part.